

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

RULES TO IDENTIFY THE)	Administrative Cause
APPLICABLE PROVISIONS OF)	Number 05-137J
THE CODE OF JUDICIAL CONDUCT)	(L.S.A. Document 06-107)

**REPORT OF PUBLIC HEARING AND COMMENTS,
AND RECOMMENDATION FOR FINAL ADOPTION**

1. RULE PROCESSING

The Natural Resources Commission (*NRC*), proposed this rule amendment to add 312 IAC 3-1-2.5, which identifies the applicable provisions of the Code of Judicial Conduct for administrative law judges of the NRC under Indiana Code § 14-10-2-2.

The NRC gave preliminary adoption to the rule package on January 18, 2006. A “Notice of Intent” to adopt the proposed rule amendment was published in the INDIANA REGISTER on May 1, 2006 at 29 IR 2587. The notice identified Stephen L. Lucas, of the NRC’s Division of Hearings, as the “small business regulatory coordinator” for purposes of Indiana Code § 4-22-2-28.1. Analysis of the proposed rule as required by Indiana Code §§ 4-22-2.1-5 and IC 4-22-2-24(d)(3) resulted in the determination that the proposed rule would impose no requirements or costs on small businesses or regulated entities.

The proposed rule amendment was submitted to the Office of Management and Budget on April 21, 2006. In a letter dated May 16, 2006, which was received by the NRC Division of Hearings on August 22, 2006, Charles E. Schalliol, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

The NRC Division of Hearings submitted the rule amendment to the Legislative Services Agency (*LSA*) along with the “Statement Concerning Rules Affecting Small Business” on September 7, 2006 for assignment of an intended date of publication. The Notice of

Public Hearing, including the statement of requirements or costs to regulated entities required by Indiana Code § 4-22-2-24(d)(3) was submitted to LSA on September 11, 2006. The Notice of Public Hearing was posted to the INDIANA REGISTER database website as 20060920-IR-312060107PRA on September 20, 2006. Following receipt of an “Authorization to Proceed” from LSA on September 12, 2006, the NRC Division of Hearings also caused a Notice of Public Hearing to be published by the Indianapolis Newspapers, a newspaper of general circulation in Marion County Indiana on September 15, 2006.

The public hearing was conducted as scheduled on October 13, 2006 at 10:30 a.m. (EDT) in Conference Center Room 8 of the Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana.

2. REPORT OF PUBLIC HEARING AND COMMENTS

a) Public Hearing Comments

No public comments were received during the public hearing conducted on October 13, 2006.

b) Comments Received Outside Public Hearing

Senator Beverly Gard, District 28, through email correspondence dated November 29, 2005 stated:

Judge Lucas,
I apologize for the delay with my reply. You are exactly correct in your assessment of the legislative intent with the phrase “applicable provisions of the code of judicial conduct”.

Your draft rule seems just fine to me and I think it will clarify the issue for any that may raise questions in the future.

I appreciate your giving me the opportunity to look at this.

3. RECOMMENDATION FOR FINAL ADOPTION

The proposed rule is an outgrowth of the Indiana General Assembly's 2005 enactment of S.E.A. 619, which amended Indiana Code § 14-10-2-2 to specify that administrative law judges appointed by the NRC may be removed for cause under the "applicable provisions of the Code of Judicial Conduct." The intent of the proposed rule is to clarify the legislative intent by identifying those provisions of the Code of Judicial Conduct that are applicable in the context of the NRC administrative law judges.

The proposed rule subjects the NRC administrative law judges to all of the provisions of the Code of Judicial Conduct except for six limited exemptions.

Canon 3B(11) refers to a judge's actions with respect to a jury verdict.

Application of the Administrative Orders and Procedures Act (*AOPA*), which does not authorize trials by jury in an administrative proceeding, renders this provision inapplicable.

Canon 3B(13) recommends that a judge prohibit the "broadcasting, televising, recording, or taking of photographs in the courtroom..." Indiana Code § 5-14-1.5-3, which is applicable to administrative proceedings before the administrative law judges of the NRC, expressly allows the public to record meetings.

Therefore, application of this Canon would directly contradict statute.

Canon 4C prohibits a judge from a broad spectrum of activities including consultation with executive or legislative bodies as well as accepting appointments to governmental committees or commissions. The NRC possesses the exclusive authority to promulgate administrative rules on behalf of the Department of Natural Resources (*DNR*). *IC 14-10-2-4(c)*. In fulfilling its obligation to the DNR with respect to rule promulgations, the administrative law judges routinely consult with DNR representatives. The administrative law judges have on occasion throughout history advised or served as the NRC's delegate to commissions, boards or committees associated with the State's participation in federal programs. Application of this Canon to the administrative law judges would prevent them from continuing to provide necessary and sometimes statutorily required services to the NRC and the DNR.

Canon 4G prohibits the practice of law except in a pro se capacity or as an unpaid advisor for a family member. Administrative law judges are typically committed to public service and occasionally represent parties on a pro bono publico (unpaid) basis. This exemption will allow an administrative law judge to continue this practice provided the representation is consistent with all remaining applicable provisions of the Code of Judicial Conduct. The prohibition of an administrative law judge from providing representation for a client for a fee remains intact.

Canon 4H(2) requires any judge who has accepted a fee for extra-judicial activities to file an annual report with the Commission on Judicial Qualifications. It would be improper for administrative law judges, as a member of the executive branch of government, to file such reports with the judicial branch. Furthermore, there exists a lack of authority for the NRC to require the Commission on Judicial Qualifications to accept such a report. The State Ethics Commission does not presently require administrative law judges of the NRC to file such reports and has no mechanism in place to maintain such reports. Consequently, the administrative law judges are unable to identify a repository for such reports. During review of the proposed rule by the Office of Management and Budget, the State Ethics Commission declined to allow such a requirement to be implemented through this proposed rule. *See August 14, 2006 email correspondence from Christopher Ruhl.* As a result, application of this Canon is simply untenable; however, it is noted that Indiana Code § 4-2-6, “Ethics and Conflicts of Interest,” would prohibit the acceptance of such a fee in any event.

Canon 5A(3), Canon 5A(4), Canon 5B(1), 5C, 5D and 5F are associated with candidates for election, appointment or retention to a judicial office.

Administrative law judges of the NRC are not subject to elections, appointments or retention as contemplated by these Canons.

The proposed rule has been shared with Senator Beverly Gard, the author of S.E.A. 619, whose comment, as set forth above, was positive. The proposed rule has also been discussed with attorneys and particularly members of the Environmental Law Section of

the Indiana State Bar Association (*ISBA*), who voiced support for S.E.A. 619 during the legislative session. These discussions have occurred at or been facilitated through presentation at the ISBA's annual meeting in October 2006, the October 2005 meeting of the Environmental Law Section of the ISBA, a continuing legal education seminar presented by the Indiana Continuing Legal Education Forum, "Environmental Law for the General Practitioner" on October 18, 2006 and through an article in the Environmental Law Section's Spring 2006 Newsletter. Informal feedback has been supportive of the proposed rule and with that background the lack of formal comments from the legal community is viewed in a positive light.

It is recommended that the Commission give final adoption to the proposed rule package.

Dated: October 24, 2006

Sandra L. Jensen
Hearing Officer

EXHIBIT “A”

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule

LSA Document #06-107F

DIGEST

Adds 312 IAC 3-1-2.5 governing standards to identify the applicable provisions of the Code of Judicial Conduct for administrative law judges of the Natural Resources Commission under IC 14-10-2-2. Effective 30 days after filing with the Publisher.

312 IAC 3-1-2.5

SECTION 1. 312 IAC 3-1-2.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 3-1-2.5 Applicable provisions of the code of judicial conduct to administrative law judges

Authority: IC 14-10-2-4

Affected: IC 4-21.5; IC 14-10-2-2

Sec. 2.5. (a) The following definitions apply throughout this section:

(1) "Administrative law judge" means an administrative law judge for the natural resources commission.

(2) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective January 1, 1999 (including amendments passed through January 1, 2006).

(b) This section is intended to assist with the implementation of IC 14-10-2-2(a)(2)(C), which requires administrative law judges to comply with the applicable provisions of the code of judicial conduct.

(c) For purposes of this section, wherever in the code of judicial conduct the term:

(1) "court personnel" or a term of similar application is used, the term applies to an employee of the commission's division of hearings, other than an administrative law judge; and

(2) "judge" is used, the term applies to an administrative law judge.

(d) Unless otherwise specified in subsection (e), the provisions of the

code of judicial conduct are applicable to an administrative law judge. These provisions shall be liberally construed to implement the intention of IC 14-10-2-2.

(e) The following provisions of the code of judicial conduct are inapplicable to an administrative law judge:

(1) Canon 3B(11) and 3B(13).

(2) Canon 4C.

(3) Canon 4G, to the extent that the practice of law in a representational capacity on a pro bono publico basis pursuant to the Indiana Rules of Professional Conduct, Rule 6.1 is prohibited. Such practice of law shall, however, be conducted subject to all applicable requirements of the code of judicial conduct.

(4) Canon 4H(2).

(5) Canon 5A(3), 5A(4), 5B(1), 5C, 5D, and 5F.

(Natural Resources Commission; 312 IAC 3-1-2.5)